

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**  
NOVAGOLD RESOURCES INC., : 20-cv-02875-LDH-PK  
Plaintiff, :  
 :  
- versus - : U.S. Courthouse  
 : Brooklyn, New York  
 :  
 :  
J. CAPITAL RESEARCH USA, LLC. : September 30, 2020  
Defendants : 10:07 AM  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE PEGGY M. KUO  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**

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1 THE CLERK: This is an Initial Conference in  
2 the matter of NOVAGOLD Resources Inc. v. J Capital  
3 Research USA, LLC, docket number 20-cv-2875. Magistrate  
4 Judge Peggy Kuo presiding.

5 Will the parties please state their  
6 appearances, starting with plaintiffs?

7 MR. RUBENSTEIN: Good morning, your Honor.  
8 Jonathan Rubenstein on behalf of plaintiff,  
9 NOVAGOLD Resources Inc., and with me is my colleague,  
10 Jordan Kazlow.

11 MR. KORZENIK: And on behalf of defendant, J  
12 Capital Research, David Korzenik of Miller Korzenik  
13 Rayman, and with me my colleague, Terence Keegan.

14 THE COURT: All right. Good morning, everyone.  
15 So this is an Initial Conference, and it's an  
16 opportunity for the parties to inform the Court a little  
17 bit more about your respective cases, and then also to  
18 set a plan for going forward.

19 Now I know that the defendants have asked for a  
20 pre-motion conference before the district judge with  
21 regard to a proposed motion to dismiss, and I believe  
22 that is coming up in October, October 13th. So Judge  
23 DeArcy Hall will decide at that point whether the motion  
24 can go forward, and in the meantime, defendant has  
25 requested a stay of discovery, assuming that the motion

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1 to dismiss goes forward.

2 I don't want to get too much into the weeds on  
3 the motion to dismiss because that's for Judge DeArcy to  
4 decide, but we may need to talk a little bit about what  
5 that will entail because that will inform my decision  
6 about whether to stay discovery, or let it go forward.

7 So Mr. Rubenstein, why don't you just start --  
8 I understand that this is a defamation lawsuit in two  
9 parts, one is defamation by libel, the other is trade  
10 libel, both under New York Common Law.

11 I understand that the defamation at issue is  
12 related to a report, and then also some Twitter -- some  
13 Tweets. And so you don't need to rehash the complaint,  
14 but you can point out the important parts, and maybe a  
15 little bit as to why you need discovery, and what kind of  
16 discovery you're anticipating, okay? Mr. Rubenstein, go  
17 ahead.

18 MR. RUBENSTEIN: (Audio interference). As your  
19 Honor pointed out yes, (audio interference) --

20 THE COURT: Mr. Rubenstein, let me stop you  
21 there. I'm sorry. Your phone line is cutting out.

22 MR. RUBENSTEIN: Oh. Oh, I'm sorry.

23 THE COURT: It's uneven in terms of picking up  
24 your voice and words.

25 MR. RUBENSTEIN: Oh, I'm sorry, is it better

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1 now?

2 THE COURT: This is much better.

3 MR. RUBENSTEIN: Okay. Thank you, your Honor.  
4 Sorry about that.

5 As you mentioned we have a sort of two causes  
6 of action for libel, each of which arises under the same  
7 set of facts. This case is a clear short and distort  
8 scheme. My client, NOVAGOLD is a gold exploration and  
9 mining company. It's based in Canada but the gold assets  
10 exist in Alaska.

11 The defendant, J Cap brands itself as a market  
12 research firm, and its historical focus has been in the  
13 tech sector, with a strong geographical focus on  
14 companies based in China, or that do significant business  
15 in China.

16 On May 28th, J Cap issued what it titled a  
17 research report on my client, NOVAGOLD, and the report is  
18 22 pages long, and nearly every sentence in the report  
19 contains an either false or misleading statement of fact,  
20 and many times both. And these false and misleading  
21 statements fall into three broad categories. I'm not  
22 going to go through all of the statements, but broadly  
23 speaking, we're talking about allegations about how  
24 NOVAGOLD has misled its investors, about costs of its  
25 significant gold exploration and mining project in



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1 Alaska, misrepresentation concerning the logistics of  
2 building that mine, and false statements about company  
3 insiders dumping shares of the company, and reducing  
4 their equity in the company.

5 And when this report was released on May 28th,  
6 NOVAGOLD shares tumbled, and they lost a substantial  
7 amount of market share as the market reacted to the J Cap  
8 report.

9 Now J Cap made no secret of the fact that it  
10 had a short position in my client, but publishing  
11 outright falsities about my client in order to push down  
12 the stock price and cover a short is improper, and it's  
13 illegal, and that's why we're here.

14 NOVAGOLD has been left with a muddled  
15 reputation, to say the least, and forced to constantly  
16 attempt to regain market's trust by showing that J Cap's  
17 report was false, and misleading, and really nothing more  
18 than a hit piece.

19 NOVAGOLD believes that this plan by J Cap to  
20 create a report that was chock-full of falsities and  
21 misleading statements, was -- and dump it on the market  
22 in an attempt to cover a short position was in place for  
23 many months, and that NOVAGOLD believes that the facts  
24 will show that J Cap didn't act alone.

25 So with its damaged reputation, and a

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1 significant amount of money already out-of-pocket on  
2 account of the J Cap report, NOVAGOLD comes here to hold  
3 it, and whomever was working with it, responsible.

4 So that's a bit about the background of the  
5 case. I'm happy to answer any other questions about the  
6 background of the case if your Honor wishes. Otherwise,  
7 I can describe the type of discovery that we will be  
8 seeking, at least in the outset.

9 THE COURT: So I just have one question. You  
10 talked about J Cap's short position, and you said they  
11 were open about it. Can you just tell me a little bit  
12 about how that information was conveyed?

13 MR. RUBENSTEIN: So the report was published on  
14 J Cap's website, and J Cap -- and it was on or around the  
15 headline, made it clear that the company had a short  
16 position in NOVAGOLD and then proceeded to release the  
17 report.

18 THE COURT: Okay. Great. Then please go ahead  
19 in terms of what discovery you're anticipating.

20 MR. RUBENSTEIN: Sure. So at least at the  
21 outset, your Honor, we would anticipate seeking discovery  
22 on a handful of different topics. We -- NOVAGOLD would  
23 like discovery on how NOVAGOLD was identified as a target  
24 for the report. The third parties that either influenced  
25 J Cap's decision to target NOVAGOLD, or worked with it to

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1 create the report, or put the report in motion.

2           Discovery, of course, about whatever research  
3 efforts that J Cap claims that it undertook to compile  
4 the report, information concerning the -- J Cap's trading  
5 of NOVAGOLD's securities, or any other related securities  
6 in the industry that could have been put in motion  
7 through this scheme.

8           Let's see. The public -- let's see, the  
9 publication of the actual report and the Tweets, your  
10 Honor mentioned the Tweets, the online publication of the  
11 defamatory statements, those were really more of the ilk  
12 of republication of many of the statements that existed  
13 in the report. We would like some, you know, discovery  
14 about who controls that method of publication of those  
15 statements, which is to say Twitter, and their Twitter  
16 account.

17           Those general categories come to mind, at least  
18 at the outset of the discovery that we would like to seek  
19 from J Cap.

20           THE COURT: Okay. So it sounds like part of  
21 what you're trying to prove in your case is that it was a  
22 scheme, and that it was deliberately published to drive  
23 down the stock prices to the benefit of the defendant,  
24 and that is one of the -- I forget which one of the  
25 libels it is where it says if you are -- I guess the

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1 definition by libel, if it's actual malice, then that  
2 would be an element of --

3 MR. RUBENSTEIN: Yes, but --

4 THE COURT: -- that (indiscernible) --

5 MR. RUBENSTEIN: Yes, that's exactly right.

6 And while we might -- and we do dispute whether actual  
7 malice is appropriate in this case, and whether NOVAGOLD  
8 is a public figure, the defendant certainly has made that  
9 assertion, that the defendant is a public figure, and  
10 that actual malice is required.

11 THE COURT: Uh-hum.

12 MR. RUBENSTEIN: And yes, and so I do agree  
13 with your Honor's characterization with a slight tweak to  
14 it, which is that it is NOVAGOLD's position that this  
15 report was created with the intent to harm NOVAGOLD, to  
16 harm NOVAGOLD's reputation in the industry, and the  
17 natural byproduct of that for J Cap would be lowering the  
18 price of stock which it would then use to cover its  
19 position in product.

20 THE COURT: Oh, okay. I would've thought it --  
21 your theory would be the other way around, that they're  
22 trying to make money and in the process, they're hurting  
23 your client's reputation, but you're saying the intent  
24 was to harm the reputation, and the byproduct was to make  
25 money.

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1 MR. RUBENSTEIN: Yes. I assume we might be  
2 talking about things that happen almost instantaneously  
3 in time.

4 THE COURT: Okay.

5 MR. RUBENSTEIN: The first has to happen before  
6 the second can happen.

7 THE COURT: Okay. And I wasn't sure if legally  
8 it made a difference, which the intent was. So I just  
9 wanted to be clear about it.

10 MR. RUBENSTEIN: Sure.

11 THE COURT: All right. So I think that's all I  
12 have. Mr. Korzenik, or Mr. Keegan, go ahead.

13 MR. KORZENIK: Yes. I'm going to try to speak  
14 on my speaker phone, if that's not as clear, then please  
15 tell me, and I'm going to go directly to the handset.

16 THE COURT: So far so good.

17 MR. KORZENIK: So far so good. So there are  
18 three points that I want to address, and one is the first  
19 one is why cases that implicate First Amendment issues,  
20 and in particular, the opinion defense which is a matter  
21 of law, a matter of U.S. Constitution, but more  
22 importantly, a matter of New York State Constitution, and  
23 why that warrants a stay.

24 The second thing I wanted to do is I wanted to  
25 look at some of the statements that they've put in their

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1 letter, that they say are actionable, and your Honor is  
2 going to see why they are matters of pure opinion.

3 And the third thing I wanted to discuss, and  
4 I'm going to move it up front because it occupied most of  
5 what my adverse colleague offered as his main pitch, this  
6 idea of some kind of short conspiracy, I do -- most of my  
7 work is media defense, and I've represented many news  
8 organizations who claim that the -- and websites that do  
9 financial reporting.

10 And in virtually every single one of them,  
11 every single one of them in which a company claims that  
12 they've been defamed by a news article, or by an analyst,  
13 and seeking out an analyst website that we've acted for,  
14 in everyone of them, they all insist that this is a  
15 conspiracy of short sellers, and that claim is usually --  
16 is almost -- not just usually, every time I've seen it,  
17 is a canard. It's total -- it's totally made up. It's -  
18 - and it's particularly --

19 When you look, for example, in the famous Enron  
20 case, the main pitch that Enron made against Fortune  
21 Magazine's writer, Bethany McLean, was that her main  
22 source was Chanos, who was a short seller. That's the  
23 same thing with WorldCom, it's the same thing with that  
24 famous case about the Big Short, Michael Lewis' book,  
25 which I had some involvement with, where Mr. Chau, who

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1 sold these CDOs sued them for -- sued the book publisher  
2 in Michael Lewis, and the short seller, Eisman, and the  
3 Court decided it was a matter of opinion. But the big --  
4 the claim that Chau was making was oh, they're short  
5 sellers, they're short sellers.

6 In Seeking Alpha, where it just comes up all  
7 the time, the claimants say exactly what Mr. Rubenstein  
8 offered, and Judge Oetken, for example, in one argument  
9 came up with this response by the Bank of the Internet  
10 suing -- Seeking Alpha to try to find out what an  
11 anonymous poster had said. The anonymous poster  
12 disclosed that he was short on BofI stock, and Oetken  
13 said, well, if there really were a shorting conspiracy to  
14 this stock, it would be somewhat odd to the posters  
15 reveal that they're short the stock, and if it truly was  
16 a conspiracy, you would think that they would hide that  
17 information. And in any event, he said I find it's too  
18 attenuated, and he threw that out on a threshold motion  
19 that involved a subpoena.

20 But what's interested, BOFI wanted to get the  
21 name of the anonymous analyst in order to sue him or her,  
22 and the Court not only didn't just stay it, it said they  
23 can't get this discovery at all through Seeking Alpha, so  
24 they couldn't sue.

25 So when First Amendment issues are implicated,

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1 as they really here, when everything is so plainly matter  
2 of opinion, and when it is a classic analyst report,  
3 typical analyst report and evaluation of a company's  
4 future projects, a bet or a prediction about its future,  
5 which is based on publically-available materials, all  
6 cited to in the complaint, and all cited to in the  
7 report, that's opinion in its purest sense.

8 Now the thing that's also significant here is  
9 in *Biro*, for example, versus *Conde Nast*, that was decided  
10 in the Southern District by Judge Oetken, and *D'Avolio*  
11 case decided in the Eastern District by Judge Feuerstein,  
12 citing *Biro*, *Biro* says Rule 12(b)(6) not only protects  
13 against the costs of meritless litigation but it provides  
14 assurance to those exercising their First Amendment  
15 rights, that doing so will not needlessly become  
16 prohibitively expensive.

17 And court generally recognize that when a case  
18 involves libel, when a case involves the First Amendment,  
19 when it involves an opinion defense, which is a  
20 constitutional matter, especially in New York under *Amino*  
21 *AG* and *Brian v. Richardson*, those two cases actually make  
22 it clear that New York's opinion defense, and its  
23 definition of opinion is broader than that of the U.S.  
24 Constitution, so that things that were considered in  
25 *Malkovich*, which the plaintiff cites that were considered



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1 to be factual, are deemed to be opinion under Judith  
2 Kaye's decision of this New York Court of Appeals in the  
3 Amino AG, and also in the Brian v. Richardson case. They  
4 look more broadly at the context of these things.

5 Analyst reports are predictions, and one of the  
6 things Amino AG says is that writers' presumptions and  
7 predictions as to what appeared to be, or what might well  
8 be, or what could well happen, or should be, would not  
9 have been viewed by the average reader of the journal.  
10 That was a science journal as conveying actual facts  
11 about the plaintiff. And that rule applies are in the  
12 commons case in which was cited, the analyst reports.

13 It applies to analyst reports as in the  
14 Biospherics case, which basically is our case. In that  
15 case, the analyst group, Sugaree, which is the company,  
16 is not up to the company's claims, but in that case, the  
17 Court said the prediction of an analyst's opinion is not  
18 actionable, however harmful it may be.

19 And Judge Daniels in the Chau case in the Big  
20 Short case, he said yeah, of course opinions can be  
21 harmful, but that doesn't make them actionable, and  
22 that's what this plaintiff is trying to say.

23 THE COURT: Can you focus on the discovery --

24 MR. KORZENIK: So what --

25 THE COURT: -- issue because these are --

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1 MR. KORZENIK: Yes.

2 THE COURT: -- ultimate issues of whether the -

3 -

4 MR. KORZENIK: Well, that is --

5 THE COURT: -- dismissal of the case at all --

6 MR. KORZENIK: -- the reason --

7 THE COURT: So --

8 MR. KORZENIK: Yeah.

9 THE COURT: -- okay, so tell me what the  
10 discovery issue is.

11 MR. KORZENIK: Well, that is -- so the  
12 discovery issue is this, and let's look at the topics  
13 that they want discovery on. The whole short business,  
14 and trying to figure out who are people are, is an  
15 invented story.

16 And note, here's the heading of our website,  
17 "Be warned. We are short-sellers. We are biased. We do  
18 our best to find and present facts based on extensive  
19 primary research, and using public resources, but we will  
20 profit if these stocks decline in value. We do not offer  
21 advice. We present our views." So that falls right  
22 into what Judge Oetken observed about the Seeking Alpha,  
23 one of the --

24 THE COURT: Can you give me the website,  
25 because I can look it up right now, and follow along.

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1 MR. KORZENIK: For BOFI, it is actually --  
2 there are several BOFI cases, but the one --

3 THE COURT: No, no, not the case. I'm looking  
4 -- you were reading from your client's website.

5 MR. KORZENIK: Oh, the website. I'm sorry.  
6 Yes. If you go -- if your Honor goes to  
7 [www.jcapitalresearch.com](http://www.jcapitalresearch.com) and Terence, I think it's at the  
8 home page.

9 MR. KEEGAN: That's right, your Honor.  
10 JcapitalReserach.com, when you access that website --

11 THE COURT: I see it.

12 MR. KEEGAN: You see a banner, and then --

13 THE COURT: It says we are biased. We go deep,  
14 so that investors don't have to.

15 MR. KORZENIK: Yes.

16 MR. KEEGAN: Yes.

17 THE COURT: Okay.

18 MR. KORZENIK: So they're making clear that  
19 their statements are - that they are shorts.

20 THE COURT: Uh-hum.

21 MR. KORZENIK: And so they're very open about  
22 it. So let's look at the statements that Mr. Rubenstein  
23 highlighted, both in his letter, and his complaint. He  
24 said, "Oh, well we misled investors." By the way, this  
25 is just like the Sugaree case, Biosphere.

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1 But look at the rest of the sentence, and then  
2 look at the report. It's about pipe dreams. It's about  
3 predictions. It's about the future. It's about a bet  
4 that it won't succeed.

5 So here's the rest of the sentence, and this is  
6 really instructive, "For the past 15 years, NOVAGOLD's  
7 management team has systemically misled investors with,"  
8 now listen, "subjective presentation of information about  
9 a deposit so remote, and technically challenging that the  
10 mine will never be built." So that's a prediction, and  
11 the rest of the report is basically is based on the  
12 opinions of the writers about the "publicly-available  
13 information" that they examined. So what that is is pure  
14 opinion.

15 Here's another one. "The Donalin Gold  
16 Project" --

17 THE COURT: Well --

18 MR. KORZENIK: -- is not feasible --

19 THE COURT: So I'm sorry to cut you off because  
20 I don't have --

21 MR. KORZENIK: Yes.

22 THE COURT: -- I didn't set aside a full hour  
23 for this discussion, so I --

24 MR. KORZENIK: Okay.

25 THE COURT: And it's not for me to decide the

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1 ultimate issue of whether this is, in fact opinion. I  
2 really need to focus on the discovery.

3 MR. KORZENIK: Right.

4 THE COURT: So can you please talk to the  
5 discovery that Mr. Rubenstein has proposed, and tell me  
6 why that shouldn't be allowed at this stage.

7 MR. KORZENIK: Well, I think I did in the sense  
8 that the whole idea that he wants to investigate who our  
9 -- who might have been cited as to write this report, or  
10 who might be involved in the report, or why we wrote it,  
11 is utterly beside the point when it comes to opinion.  
12 This case will be dismissed on that ground.

13 THE COURT: Uh-hum.

14 MR. KORZENIK: And the whole idea of a stock --  
15 being short is not an impropriety. And being a short  
16 seller is not an impropriety, it is one of the important  
17 functions of the market. So his effort, which he focuses  
18 on here to explore the short -- the motivation for the  
19 article, is utterly beside the point and it's a waste of  
20 time, and we don't have that kind of -- those types of  
21 resources to spend on that kind of really fishing  
22 expedition.

23 So what's going to happen though for us is if  
24 the actionable statements are deemed to be a legitimate  
25 basis for discovery, and they are not, they're opinion,

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1 we're going to be spending huge amounts of time having  
2 experts talk about whether it's "feasible to put into  
3 production at any gold price because it's so remote and  
4 technically challenging a mine to build", is that  
5 something a jury should decide? Should the jury be  
6 asked, or should we have to get discovery on whether that  
7 prognosis is right or wrong?

8 THE COURT: Well, I didn't hear --

9 MR. KORZENIK: They say (audio interference) --

10 THE COURT: I'm sorry. Again, I'm just trying  
11 to --

12 MR. KORZENIK: Yes.

13 THE COURT: -- bring you back to the points  
14 here. Mr. Rubenstein is not asking -- that was not on  
15 his list of discoverable items at this stage.

16 MR. KORZENIK: Well, look --

17 THE COURT: The items listed do not include the  
18 expertise, it was information, and I can go through it  
19 again if you want to know what to focus on, he said  
20 information on NOVAGOLD identified this particular  
21 plaintiff as a target --

22 MR. KORZENIK: That's not (audio interference).

23 THE COURT: -- and the third parties to work  
24 together. So can you just focus on those things, and --

25 MR. KORZENIK: Yes.

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1 THE COURT: -- why it shouldn't be the subject  
2 of discovery now.

3 MR. KORZENIK: The subject of discovery that I  
4 was raising was stuff that he had put into his initial --  
5 you know, his statement about -- to us earlier in our  
6 meeting about what discovery he wanted.

7 THE COURT: Uh-hum.

8 MR. KORZENIK: So I guess he's not interested  
9 in those things, but --

10 THE COURT: At this stge. I asked him to tell  
11 me what discovery --

12 MR. KORZENIK: Oh.

13 THE COURT: -- he wants now.

14 MR. KORZENIK: So what I'm saying is that this  
15 -- what he just raised has nothing to do, the reason that  
16 we wrote the article has nothing to do with whether a  
17 reasonable reader would view it as opinion or not under  
18 New York's Constitutional definition of opinion because  
19 if it is opinion, which can be decided on a reading of  
20 the words by a judge, it's a root matter of law to be  
21 decided by the Court, that discovery is not needed.

22 And that applies generally to this short  
23 conspiracy. We've disclosed, and he admits that we've  
24 disclosed that we are short sellers, and there's nothing  
25 wrong with that.

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1 THE COURT: Uh-hum.

2 MR. KORZENIK: So the real question is why do  
3 we have to spend time, and money, providing disclosure of  
4 something that is irrelevant to the motion that we've  
5 made, and really ultimately is not even a -- isn't going  
6 to survive a Rule 12(b)(6) motion. So those --

7 THE COURT: So you're saying that the motion on  
8 whether this is the issue, which you're going to pose in  
9 the motion to dismiss of whether this is opinion, should  
10 be decided just on the four corners of the alleged  
11 statement and the complaint. There should --

12 MR. KORZENIK: That's correct.

13 THE COURT: -- be no (audio interference)  
14 information necessary to make that determination.

15 MR. KORZENIK: That's correct. He does not  
16 need any of that, or nor do we, in order to ascertain  
17 whether --

18 THE COURT: Nor does Judge DeArcy Hall.

19 MR. KORZENIK: -- (audio interference)  
20 statement -- exactly. And that's exactly what the Ammino  
21 case, that's exactly what the Chau case, is what every  
22 case on opinion says, is that you don't need any of this  
23 stuff. You do it on the basis of the four corners of the  
24 complaint, and Judge Feuerstein in D'avolio says you look  
25 at all of the documents in the complaint, and that a



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1 reference that's incorporated by reference therein, and  
2 that is the basis for terminating the action.

3 THE COURT: Okay.

4 MR. KORZENIK: And so I am pointing to the  
5 general constitutional policy that when First Amendment  
6 issues are implicated, and opinion is going to be the  
7 dispositive case -- and by the way, even if he contends  
8 that something might survive, why should we have  
9 discovery about whether you need that horizontal drilling  
10 across screens or not?

11 THE COURT: He didn't say that --

12 MR. KORZENIK: Why are we even having --

13 THE COURT: -- as part of what he is requesting  
14 in the discovery at this point.

15 MR. KORZENIK: He did in his papers to us, but  
16 if he's --

17 THE COURT: Again, this is --

18 MR. KORZENIK: -- just asking --

19 THE COURT: I asked specifically what discovery  
20 he wants now, and that was not on the list. So --

21 MR. KORZENIK: Right, but keep in mind that if  
22 we needed to protect -- defend ourselves in this case,  
23 and prove that our opinions are good ones, then we would  
24 have to do a lot of Alaskan depositions in order to  
25 confirm some of those things.

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1 THE COURT: Sure.

2 MR. KORZENIK: So that's just not fair. But  
3 the other -- so it relates to the fact that our discovery  
4 burdens would be incredibly onerous, and their requests  
5 for discovery into why we wrote this report is just  
6 utterly a sideshow. It's a sideshow of the claim, and  
7 it's a total diversion from the actual legal issue that  
8 we are raising in our 12(b)(6) to Judge Hall.

9 And so for that reason, I'm requesting that  
10 this discovery, and all discovery, burdens be deferred  
11 until this motion can be determined.

12 THE COURT: Okay. So Mr. Rubenstein --

13 MR. KORZENIK: It may be that the whole thing -  
14 -

15 THE COURT: Yes.

16 MR. KORZENIK: -- the conspiracy thing is also  
17 going to fall by the way in the motion for --

18 THE COURT: I hear you. All right.

19 Mr. Rubenstein, why do you need to do the  
20 discovery now rather than perhaps in a few weeks, or a  
21 few months?

22 MR. RUBENSTEIN: So our position, your Honor,  
23 is that the -- I mean, as we put in our letter, we as the  
24 plaintiff, you have a general right to a speedy  
25 resolution of the claims, and the longer that this false

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1 report that belies my client left and right is out there,  
2 the longer that my client has to spend time and money  
3 with investors, and the market, in beating back the  
4 falsities time and time again, and delays to justice that  
5 it is due.

6 And what I'm hearing from opposing counsel is  
7 an argument is similar to sort of what we hearing the  
8 context as if personal jurisdiction were at issue in, you  
9 know, limiting it to something that is needed to resolve  
10 the motion to dismiss.

11 And what we are talking about more is the  
12 general principle that the filing of the motion to  
13 dismiss doesn't get you a stay of merits discovery, and  
14 we believe that merits discovery ought to proceed for one  
15 of the reasons -- one of the reasons is what I just  
16 mentioned. Another one is this -- as we mentioned in the  
17 letter, we believe that discoverable information is  
18 contained by third parties who are not under any  
19 obligation to preserve documents at the moment, and may  
20 not even have been identified, and so we want --

21 MR. KORZENIK: Could you tell us how that  
22 relates to the motion?

23 THE COURT: Can you please not interrupt?

24 MR. KORZENIK: Okay.

25 THE COURT: Go ahead.

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1 MR. RUBENSTEIN: And so --

2 MR. KORZENIK: All right.

3 MR. RUBENSTEIN: -- and so we believe that the  
4 potential pendency of a motion to dismiss in this case,  
5 and I know your Honor doesn't hear me of the merits of  
6 the motion to dismiss, so I am not going to go into that,  
7 but suffice it to say is that we think that this is not  
8 the motion of the ilk that opposing counsel just  
9 described.

10 So our view is that the potential pendency of  
11 this motion to dismiss is not something that should put  
12 the brakes on merits discovery, and stand in the way of  
13 the speedy resolution of our claims, which we wish to  
14 begin pursuing discovery on immediately.

15 THE COURT: All right.

16 MR. KORZENIK: Your Honor?

17 THE COURT: So Mr. Korzenik, you wanted to say  
18 something? Yes, you can now.

19 MR. KORZENIK: Yes. So the reason that I say  
20 that this short conspiracy, which we deal with all the  
21 time, is irrelevant, is that if the statements are  
22 opinion, then the short conspiracy falls apart, and for  
23 that reason -- the other thing is that Jonathan is -- you  
24 know, as with many commercial litigators, they view this  
25 just as a commercial case, but when the case implicates

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1 the First Amendment, then 12(b)(6) is supposed to protect  
2 defendants from exercising -- who exercise their First  
3 Amendment rights, and assuring them that doing so will  
4 not needlessly become prohibitively expensive.

5           So there's a policy in many -- most libel  
6 rulings that there should be an early disposition on  
7 motions to dismiss, and that they should be permitted,  
8 and that's what the Judge Oetken did in *Biro*, and that's  
9 what most courts, in fact Judge Sack as well, favors  
10 early disposition of these cases. And if this stuff is  
11 opinion, then the conspiracy canard falls away, and  
12 that's why I'm asking for a stay pending resolution of  
13 the motion.

14           THE COURT: All right. So --

15           MR. KORZENIK: But I'll just close with one  
16 thing, the *Sandals* case which they cite, your Honor  
17 should look at that too, because it goes to the New York  
18 constitutional definition of opinion, and it cutoff  
19 discovery all together of *Sandals Resort Company*, that  
20 wanted to get to the bottom, just as these plaintiffs do,  
21 of the negative statements that were made about their  
22 company, and that hurt their stock price. The Court  
23 found it to be pure opinion based on the documents  
24 reviewed, and presenting the defendants' point of view.  
25 Discovery wasn't just stayed, it was outright denied.

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1           THE COURT: All right. So I think that the  
2 limited discovery that's been proposed can go forward,  
3 and so I will deny the motion to stay discovery, but  
4 given that you have your conference before Judge DeArcy  
5 Hall in about two weeks, if you want to raise the issue  
6 with her again, it is your prerogative, because she has  
7 the right to overrule any of my decisions, but I think  
8 that based on what I am hearing, there isn't a strong  
9 enough basis to stop all discovery, especially given the  
10 limited discovery that Mr. Rubenstein has put forward as  
11 a proposed set of early discovery, and especially given  
12 concerns about preservation of materials in this area.

13           So let me just take a quick look --

14           MR. KORZENIK: We of course are preserving --  
15 we're preserving materials. The one question I have,  
16 your Honor, is do we need to do sort of formal objections  
17 before the 13th, or can we imply know that the discovery  
18 is stayed until we present the same issue before Judge  
19 Hall?

20           THE COURT: Well, I will put down her that the  
21 -- that I'm denying the request to stay, and if you want  
22 then to post something saying that you intend to object  
23 to that, and would seek leave to bring it up at the  
24 conference on October 13th, then that will let Judge  
25 DeArcy Hall know that that's what you intend to do, all

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1 right?

2 MR. KORZENIK: And would you also make note of  
3 the fact that it was some limited discovery, that it  
4 wasn't plenary?

5 THE COURT: I'm sorry, to make note of what?

6 MR. KORZENIK: That -- note that it was  
7 limited, some limited discovery --

8 THE COURT: Yes, that is limited to --

9 MR. KORZENIK: -- (audio interference).

10 THE COURT: -- the items that Mr. Rubenstein  
11 mentioned to start, and then, you know, as we move  
12 forward, if there's a need -- we would be doing it in  
13 steps, because I don't know how long this -- number one,  
14 whether the motion to dismiss will go forward, and number  
15 two, if it does, how long it will take.

16 So if it turns out, for example, that it takes  
17 several months, and there's a point at which the  
18 plaintiffs then say okay, we've done this first phase,  
19 we're still waiting for a decision but we would like to  
20 proceed with the next phase, of course they could raise  
21 that. That is how I intend to manage the discovery in  
22 this case. All right?

23 So the motion to stay discovery was a motion to  
24 stay all discovery, I'm denying it. I'm permitting the  
25 limited discovery to go forward on the items that Mr.

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1 Rubenstein outlined, and so unless Judge DeArcy Hall  
2 overrules me, you should move forward on that. It  
3 doesn't stop the parties from coming back to say we would  
4 like to do more discovery, and for me to then look at  
5 where you are at that point, and what that next discovery  
6 is. Okay?

7 MR. KORZENIK: Okay.

8 THE COURT: So I think it's worth doing things  
9 in this phased way. Mr. Korzenik?

10 MR. KORZENIK: Yes, thank you, your Honor.

11 THE COURT: All right. So I --

12 MR. RUBENSTEIN: Thank you, your Honor. I  
13 appreciate your time.

14 THE COURT: And so what I will do is the  
15 discovery plan that you've given me sets forth some dates  
16 including a settlement conference date, so let's spend a  
17 few moments. Now this was, I know, submitted  
18 unilaterally by the plaintiffs.

19 Mr. Korzenik, do you want to have a settlement  
20 conference with the Court at some point too?

21 MR. KORZENIK: We have discussed it with the  
22 other side, but I -- at this stage, I think it's going to  
23 be difficult. I think that I'm always open to discussing  
24 it with them. We don't have hostile relations by any  
25 means. I'm not sure how it would be done, but I think we



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1 would consider that maybe at some later stage.

2 THE COURT: All right. So what I'll do is I  
3 will not enter a scheduling order today. I will let the  
4 parties go back to the table, have some discussions, and  
5 then perhaps after October 13th, set forth a plan,  
6 whether discovery is moving forward -- if discovery is  
7 not stayed, let's say, that you should put forward a plan  
8 for how discovery will move forward, and at that point,  
9 you can also put down dates for settlement, and all those  
10 other dates, if you can predict at that point.

11 If you don't know, then you can simply say, you  
12 know, TBD, to be determined, but at some point soon, we  
13 need to have a scheduling order that either has dates, or  
14 states that things are being put off for a while, all  
15 right?

16 MR. KORZENIK: Okay.

17 MR. RUBENSTEIN: Okay.

18 THE COURT: Is there any questions, Mr.  
19 Rubenstein?

20 MR. RUBENSTEIN: Not from me, your Honor.  
21 Thank you for your time today.

22 THE COURT: And Mr. Korzenik?

23 MR. KORZENIK: Nothing further, your Honor.  
24 Thank you.

25 THE COURT: All right. Thank you, everybody.

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1 Appreciate it.

2 MR. KORZENIK: Thank you.

3 MR. RUBENSTEIN: Thank you.

4 (Matter Concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 6th day of October 2020.

  
Linda Ferrara

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